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Supreme Court, U.S.
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No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the defendant in a civil action under Title VII of the Civil Rights Act of 1964, as amended, entitled to summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure upon its assertion that the plaintiff's job performance has been inadequate, despite a detailed rebuttal of this assertion by the plaintiff?

2. Is the defendant in a civil action under Title VII of the Civil Rights Act of 1964, as amended, entitled to summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure when it has objected to the plaintiff's discovery requests and a motion to compel discovery is pending?

PARTIES TO THE PROCEEDING

Petitioner Ping L. Ku was the Plaintiff in the District Court, and Appellant in the Court of Appeals for the Fourth Circuit.

Respondent Allied-Signal, Inc., was the Defendant in the District Court, and Appellee in the Court of Appeals.

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ALLIED-SIGNAL, INC.,

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Ping L. Ku petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit (App. 1a) was entered on December 30, 1988. The Opinion is

not reported. The Opinion of the United States District Court for the Eastern District of Virginia of July 20, 1988, granting summary judgment for Respondent Allied-Signal, Inc. (App. 6a), is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1988. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was denied by Order of February 3, 1989 (App. 3a).

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

Relevent portions of the provisions of Title 42, United States Code and of the Federal Rules of Civil Procedure appear in the Appendix, at pp. _____.

STATEMENT OF THE CASE

Ping L. Ku is a chemical engineer, a naturalized citizen of the United States, and a native of China. He has over 20 years experience in polymer syn-

thesis. In August, 1984, Ku submitted his resume in response to an advertisement placed by Allied-Signal, Inc., for a position as a Research Engineer in polymer science at Allied's Technical Center in Petersburg, Virginia.

Ku was initially interviewed for this position in September, 1984, and was interviewed again in December, 1984, as one of the final candidates for the position. Ku was offered the position and accepted it at an annual salary of $40,200. He began his employment with Allied effective February 11, 1985.

When Ku began his employment, he was supervised by Charlie Cole, Manager of the Applied Research Group. Cole's supervisor was Alan Francario, Manager of the Product Development Department. Francario was replaced during 1985 by Ed Duffy. Duffy's immediate superior was Ray Biron, Director of Technical and Commercial Development.

Until December 10, 1985, Cole did not express any dissatisfaction with Ku's work (Ku Affidavit, ¶

5). Then, on December 10, 1985, Cole presented Ku with an evaluation which was very critical of Ku's performance. Allied has never offered any explanation of the timing of the December 10, 1985 evaluation, which was neither a six-month evaluation or an annual evaluation. Ku was not asked to comment on the evaluation or to provide any input to the evaluation whatsoever. When Ku inquired of Cole why he had written such a negative evaluation, Cole replied that he was told to do so by his supervisor, Duffy.

In his December 10, 1985 evaluation, Cole offered criticism of four of the nine projects which had been assigned to Ku, while indicating that Ku's performance on three other projects had met or exceeded Cole's expectations (Ku Affidavit, ¶ 5,6). Cole also produced a "3 Month Action Plan" which he said was developed to help Ku improve his effectiveness.

In late 1985, Allied implemented a "census/cost reduction program" in which the various sectors of

the corporation were to identify positions which could be eliminated without adversely affecting business operations. This program provided enhanced severance benefits to the persons whose positions were eliminated. Ku's position was selected for elimination under this program. At that time, Ku was the only employee in his group of Asian/Chinese national origin, and the only employee in his department singled out for termination under the census/cost reduction program.

On December 12, 1985, Duffy and Cole met with Ku and informed him that his position was being eliminated under the census/cost reduction program. The enhanced severance benefits offered by the census/cost reduction program gave Ku sufficient credit for a pension of $600 per month from Allied, which he received. Ku was removed from his position on January 31, 1986.

Ku filed a complaint of discrimination against Allied with the Equal Employment Opportunity Commission, and in due course received a Notice of

Right to Sue. He filed the present action in the United States District Court for the Eastern District of Virginia under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., alleging that Allied discriminated against him on the basis of his race when it eliminated his job and terminated his employment. The District Court's jurisdiction over this complaint is grounded in 28 U.S.C. §§ 1331 and 1343.

Allied filed a motion for summary judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure, relying on the deposition given by Ku and an affidavit provided by Biron. No affidavit from either Cole or Duffy was presented. At the time the motion for summary judgment was filed, Allied had not produced many of the documents which Ku had requested in discovery, and a motion to compel discovery was pending. Ku objected to the Court's consideration of the motion for summary judgment while this discovery matter was pending (Memoran-

dum in Opposition to Motion for Summary Judgment, pp. 1-2).

Allied contended in support of its motion for summary judgment that Ku could not establish a prima facie case of discrimination because he could not prove that he was performing his job at a level that met Allied's legitimate expectations, and because Ku's position was abolished and he was not replaced by a person not in the protected group. Allied also contended that Ku could not show that Allied's stated reason for eliminating his position was a mere pretext for discrimination (Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 12-16).

In response to Allied's motion for summary judgment, Ku presented a detailed affidavit with a careful and factual analysis of each of the criticisms leveled at him by Duffy, showing that each of these criticisms was grossly unfair. Ku also pointed out that Biron, who was three levels of supervision removed from Ku, had no personal knowledge of Ku's

work, had never observed Ku's work or discussed Ku's work with him, and was therefore relying entirely upon the representations of Cole and Duffy.

The District Court granted Allied's motion for summary judgment, holding that, while the evaluation given to Ku by Cole may have been inaccurate and unfair, "there is nothing to indicate that any inaccuracy or unfairness is the product of discriminatory intent" (App. 16a-17a). The District Court also noted that "it belies logic to think that Allied would hire Ku over non-Asians in February only to discharge him because of his race in December" (App. 17a). On Ku's appeal, the Court of Appeals affirmed the judgment "on the reasoning of the district court" (App. 2a).

REASONS FOR GRANTING THE WRIT

There exists a fundamental conflict between the judgment of the District Court and the Court of Appeals in this case and the guidelines established by this Court for the consideration of motions for

summary judgment under Rule 56, Federal Rules of Civil Procedure, especially as they should be applied in cases of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. This case presents a basic issue in the application of Rule 56 which warrants further guidance from this Court to the lower Courts with respect to the appropriateness of summary judgment in a case in which motive and intent are critical elements of a claim or defense.

This case also presents a basic issue in the litigation of claims under Title VII. The award of summary judgment to the defendant in this matter in the face of evidence that its proferred explanation for its conduct is unworthy of belief will, if uncorrected, significantly interfere with the effectiveness of Title VII as a tool in combatting invidious discrimination in employment. The uncritical acceptance by the lower Courts of the rationale offered by the employer for its actions signals a departure from the guidance of this Court

in prior Title VII cases, and permits employers to avoid appropriate scrutiny of their motives and states of mind which can only result from a trial in which the trier of fact can observe the demeanor of the witnesses on direct and cross examination.

The entry of summary judgment for the defendant in this matter while a significant discovery matter was pending also merits review by this Court. Where the vast majority of the documents which the plaintiff might be able to use to rebut the defendant's claimed non-discriminatory reason for its actions are in the possession of the defendant, the district courts should be very reluctant to award summary judgment to a defendant while a discovery dispute remains unresolved. This issue is one of general importance in the administration of summary judgment procedures under Rule 56.

I. THE DISTRICT COURT AND THE FOURTH CIRCUIT HAVE MISSAPPLIED THE STANDARDS TO BE USED IN GRANTING MOTIONS FOR SUMMARY JUDGMENT IN A MANNER WHICH CONFLICTS WITH THIS COURT'S DECISION IN ADICKES v. S. H. KRESS & CO., 398 U.S. 144 (1970).

It is well established that in considering a motion for summary judgment under Rule 56, Fed. R. Civ. P., the burden is upon the moving party to demonstrate the absence of any genuine issue of material fact and the court must view the facts and the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-9 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The district court and the Fourth Circuit have clearly violated this fundamental rule in their consideration of Allied's motion for summary judgment, and have taken a view of the facts most favorable to Allied and drawn inferences from the facts in a manner favorable to Allied.

The district court's memorandum setting forth its reasons for granting the motion for summary judgment is replete with such examples. For example, the district court infers from the fact that Cole included a three month action plan in his December 10, 1985 evaluation of Ku's performance that Cole actually intended to retain Ku for the immediate future, which suggested to the district court that Ku's theory of discrimination was not worthy of credence (App, p. 13a-14a). Viewed in the light most favorable to Ku, the fact that Ku was informed only two days later that his position was to be abolished under the census/cost reduction program would suggest that the "three month action plan" outlined by Cole was a mere smoke screen, and that the December 10 evaluation was designed entirely to support the decision to eliminate Ku's position.

The district court also suggests that Ku was aware that he was not completing his assignments in a timely manner prior to December 10, 1985, relying on Ku's testimony at page 129 of his deposition. In

fact, Ku's testimony was that his completion of the assignment in question was delayed by factors beyond his control.

The district court also found that "it belies logic to think that Allied would hire Ku over non-Asians in February only to discharge him because of his race in December" (App. 17a). This analysis by the district court not only draws a significant inference in a manner most favorable to Allied, but also ignores the fact that Duffy had taken control of Ku's department from Francario in the meantime. When asked why he had given Ku such an unfavorable evaluation, Cole told Ku that he did so because Duffy told him to do so. Viewed in the light most favorable to Ku, these facts show that the change in Allied's management between February and December would explain the apparent inconsistency and point to Duffy as the Allied manager whose motivations and attitudes require closest scrutiny by the finder of fact. However, no affidavit from Duffy was ever presented to the district court.

The district court excuses its failure to consider the detailed rebuttal of Cole's performance appraisal by characterizing Ku's affidavit as "protestations and conclusory allegations" (App. 16a). Ku's detailed and factual nine-page affidavit, in fact, provides a point-by-point rebuttal of every matter raised by Cole as a criticism of Ku's work. The district court's reliance on Mack v. W. R. Grace Co., 578 F.Supp. 626 (N.D.Ga. 1983), was entirely misplaced. In that case, the employer showed that the plaintiff had been counseled for poor job performance sixteen times over a two year period. This counseling was evidenced by handwritten notes kept by the plaintiff's supervisors and providing detail after detail of the plaintiff's poor performance. The plaintiff's response was that his performance had been good and that he had been "framed," but the plaintiff provided no facts to support his bald claim that he was "framed." The contrast between the record in Mack and the record in the present case could not be greater.

The district court and the Fourth Circuit have disregarded the facts presented by Ku and have drawn numerous tenuous inferences favorable to Allied from the facts presented by it. Most significantly, however, the lower Courts have disregarded the fact that Allied has not presented any affidavits from either Cole or Duffy, the Allied officials whose actions are most in question. The moving party in a motion for summary judgment may meet its burden under Rule 56 by pointing out to the Court a failure of proof on an fact essential to the plaintiff's claim. Celotex Corp. v. Catrett, _____ U.S. _____ (1986). However, where Ku's affidavit has cast serious doubt on the good faith of Cole and Duffy, the failure of Allied to present any account of the matter from these two key actors should be taken into account. Adickes v. S. H. Kress & Co., supra, at 158-9.

In sum, the district court and the Fourth Circuit have ignored this Court's guidance in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464,

473 (1961), which applies with equal force to discrimination suits as it does in the field of antitrust:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

(Footnote omitted.)

II. THE DEGREE OF PROOF IMPOSED BY THE DISTRICT COURT AND THE FOURTH CIRCUIT UPON A PLAINTIFF IN A CIVIL ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 RESPONDING TO A MOTION FOR SUMMARY JUDGMENT IS UNREASONABLE AND UNREALISTIC, AND WILL DECREASE THE VITALITY OF THAT ACT AS A REMEDIAL DEVICE FOR INVIDIOUS DISCRIMINATION IN EMPLOYMENT.

In Anderson v. Liberty Lobby, Inc., _____ U.S. _____ (1986), the Court held that the determination of whether or not to grant a motion for summary

judgment must be guided by the substantive evidentiary standards that apply to the case. In a case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., these standards are provided in the landmark decisions of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The district court and the Fourth Circuit have failed to heed these standards in granting summary judgment for Allied in this case.

It is undisputed that Ku is a member of the protected class under Title VII, and that he was discharged by Allied. It is also undisputed that Ku was the only member of the protected class in his department, and that he was the only person in his department singled out for discharge under the census/cost reduction program. The district court is unclear in its memorandum whether or not it viewed these facts as sufficient to establish a prima facie case of discrimination (App. 15a). However, the

district court assumed that Ku had established a prima facie case of discrimination, and proceeded in accordance with McDonnell Douglas to examine the non-discriminatory reason for its actions advanced by Allied.

Ku does not dispute that Allied has met its burden of articulating a legitimate, non-discriminatory reason for its actions. It is then Ku's burden to offer evidence from which a reasonable finder of fact might conclude that Allied's stated reasons were in fact a pretext for discrimination.

In Burdine, this Court stated that an employee may meet his burden of demonstrating that the reason advanced by the employer is a pretext for discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." 450 U.S. at 256.

Biron's said in his affidavit that his selection of Ku's position for elimination under the census/cost

reduction program was largely based on the reports of Ku's job performance he received from Cole and Duffy. According to Ku, Biron would not have had any opportunity to examine first-hand Ku's job performance. Cole's stated views of Ku's job performance are contained in his appraisal of Ku on December 10, 1985. Thus, the only factual basis in the record for Biron's decision to eliminate Ku's position is the December 10 evaluation, which Cole said he was told to write by Duffy.

Ku has provided a detailed affidavit showing that Cole's criticisms found in the December 10 evaluation are not worthy of credence. Ku's evidence, if believed, would show that Cole grossly distorted his job performance in the December 10 evaluation, that Cole had never prior to December 10 shown any dissatisfaction with Ku's performance, and that the whole evaluation was cobbled together to give support to Allied's plan to dismiss Ku for no valid reason. This, coupled with Ku's unique status as the only minority in his department, would permit

a reasonable finder of fact, after scrutinizing the demeanor of Allied's officials under cross-examination, to conclude that they acted with improper discriminatory motive and intent.

The district court and the Fourth Circuit, however, disregarding the dictates of Burdine, have imposed a more stringent standard of proof upon Ku. They have, in effect, imposed upon Ku a requirement to present direct proof of discrimination, such as evidence of racist statements by Allied personnel, racial slurs directed against him by his supervisors or other Allied officials, or documentary evidence showing a consciousness of race on the part of Allied officials involved in the case.

Of course, such direct evidence of racial animus will very rarely be found, especially in cases involving relatively high level professional employees. In such cases, plaintiffs in discrimination actions under Title VII must necessarily rely upon circumstantial evidence of racial animus. The plaintiff must seek to prove that the proffered nondis-

criminatory basis for the defendant's actions is false, and that the defendant's officials must have known it to be false. The trier of fact can then conclude, on the basis of all the evidence, that the employer acted in bad faith in his dealings with the employee. If the employee were a member of a racial minority, and were the only employee affected by the employer's actions, the trier of fact could conclude that racial discrimination was the underlying basis for the bad faith actions of the employer.

Under the reasoning of the district court and the Fourth Circuit, an employer in a Title VII case need only show that at some time prior to the alleged discriminatory termination one or more of the plaintiff's superiors has expressed dissatisfaction with the plaintiff's work performance. That expression of dissatisfaction may be unfair, it may be unjust, it may be false, and it may be deliberately instituted and timed to provide apparent support for a planned adverse action against the employee. Unless the employee can provide the court with direct evidence

that racial bias was the basis for the untrue job performance evaluation, the employer is entitled to summary judgment.

This rule is a license for discrimination by the sophisticated bigot. He can easily produce a document comparable to Cole's December 10, 1985 evaluation of Ku, and use it to justify any action he wished to take against any minority employee, secure in the knowledge that no court will ever seek to question the veracity or validity of his evaluation. If he carefully refrains from racial insults he can weed out any minorities who come under his supervision and maintain his all-white work force indefinitely.

This is surely not what Congress intended in enacting Title VII. It does not comport with this Court's guidance in Burdine. It conflicts with the rule in the District of Columbia Circuit. Lanphear v. Prokop, 703 F.2d 1311 (D.C.Cir. 1983). If followed, it would significantly diminish the utility of Title VII as a remedy for invidious discrimination in employ-

ment. These factors make the question of whether a court may refuse to consider indirect proof of discriminatory intent in an employment discrimination case worthy of review by this Court.

III. THE DISTRICT COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT FOR THE DEFENDANT WHILE THE PLAINTIFF'S MOTION TO COMPEL DISCOVERY WAS PENDING.

On June 20, 1988, Allied responded to Ku's Third Interrogatories and Third Request for Production of Documents, both dated May 20, 1988. Allied stated at that time that it was unwilling to provide Ku with many of the documents he sought in discovery without a protective order which would require Ku to keep the documents and their contents confidential. A draft protective order was furnished with the response. Ku agreed to the protective order, and it was entered by the district court on July 6, 1988. In the meantime, Allied filed its motion for summary judgment on June 22, 1988. Remarkably, the memorandum filed by Allied in

support of its motion for summary judgment states that "[t]he parties have now essentially completed discovery in this action."

On June 23, the district court entered an Order requiring Ku to submit his response to Allied's motion for summary judgment on or before July 6, 1988. On June 30, Ku requested an extension of time to respond to the motion for summary judgment until July 22, 1988. On July 5, the district court extended the time for Ku to respond to Allied's motion for summary judgment until July 15, 1988.

Ku filed his response to Allied's motion for summary judgment on July 6, 1988. In his memorandum in opposition to Allied's motion for summary judgment, Ku strenuously objected to the district court's consideration of the motion at a time when, because of delays imposed by Allied, substantial discovery remained unanswered. Ku requested that the Court delay consideration of the motion for summary judgment until he had an opportunity to

review the documents which had been requested but not provided.

On July 19, 1988, Ku filed a motion to compel discovery. In his memorandum in support of his motion to compel discovery, Ku stated that many of the documents which he sought for the purpose of demonstrating that Cole's characterization of his performance in the December 10, 1985, performance evaluation was not worthy of credence and of comparing his performance with that of other non-minority personnel in his department were not made available to him, despite the entry of the protective order. The next day, July 20, 1988, without any consideration of Ku's motion to compel discovery whatsoever, the district court awarded summary judgment to Allied.

Under these circumstances, the district court should at least have considered Ku's motion to compel discovery before granting Allied's motion for summary judgment, particularly since the district court's chief criticism of Ku's response to the motion

for summary judgment was that it consisted of protestations and conclusory allegations by Ku, rather than objective evidence. Instead, the district court should have acted in accordance with Rule 56(f), Fed. R. Civ. P., and either refused the application for judgment or taken some other measure to insure that Ku had a sufficient opportunity to gather the documents necessary to support his allegations. Celotex Corp. v. Catrett, _____ U.S. _____, _____ at note 6 (1986). While this matter was raised by Ku before the Fourth Circuit, that Court's opinion did not address or consider this point.

The district court's departure from the requirement that summary judgment not be granted unless the non-moving party has had an adequate opportunity to discover documents critical to his case merits review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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